BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER RULING DECISION NO. R-148 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

VICTORY BOWLING CENTER, INC.
(Employer)

PRECEDENT
RULING DECISION
No. P-R-342

FORMERLY
RULING DECISION
No. R-148

Employer Account No.

Claimant: Robert H. Powell
S.S.A. No.:
BYB: 11103 SD: 11103

The employer appealed to a referee from the Notice of Determination on Charge to Reserve Account of the Department of Employment which held that the employer's account was charged with ten times the claimant's weekly benefit amount, or a total of $550, under section 1030.5 of the Unemployment Insurance Code. After the issuance of Referee's Decision No. BK-R-10467, we set it aside under section 1336 [now section 413] of the code.

STATEMENT OF FACTS

The claimant worked for the employer as a bartender for several months. He was discharged on November 10, 1963.

The claimant filed a claim for benefits effective November 10, 1963. His weekly benefit amount was determined to be $55. He informed the department that his supervisor had stated as the reason for the discharge that the claimant did not fit into the organization.

On November 14, 1963, the department mailed to the employer a notice of the claim filed, and a notice of computation was mailed to the employer on December 6, 1963. The first reply received by the department was the employer's agent's form letter which, on December 23, 1963, requested a ruling under section 1030 of the code, and stated:

> "'According to the employer, the claimant was discharged when he reported for work under the influence of intoxicating liquor. The claimant breached a material duty owed his employer, and his conduct constitutes misconduct.'"

The above-quoted statement was based upon the employer's communication of December 10, 1963 to the agent, which was as follows:

> "'Discharged--reason--not doing job in proper manner--drinking too much.'"

During the course of its investigation, the department telephoned the claimant's former supervisor, read to him the statement of the agent, and asked why the claimant had been discharged. The departmental representative made the following notation of the supervisor's reply:

> "'This interviewer phoned Mr. Klares this p.m. who stated 'Did the letter (of protest) say that? He wasn't drunk. I just felt that he wasn't capable of the job as bartender.' I asked if there was anything he'd consider misconduct and he said 'no'.'"

On January 8, 1964 the department mailed to the agent a Notice of Potential Charge to Reserve Account indicating the discrepancies between the initial statement of the agent and those of the claimant and his former supervisor, and requested an explanation within ten days. The agent responded on January 10, 1964 as follows:

"'In reply to your DE 3802 we supply the following information:

"'1. Enclosed is the questionnaire which was completed by the employer and returned to our office. The information given in our protest came from this source.'"

"'2. Mr. Klares states that the department asked him if the claimant was drunk and he said no. No other question was asked about drinking. In other words he will testify that the claimant was under the influence of alcohol but he was not what he considered as drunk on the last day of work.'"

"'There has been no false statement made only a misinterpretation of terminology by the department.'"

"'Further, the information was untimely and therefore immaterial information.'"

The questionnaire referred to is a photocopy of the employer's communication to the agent on December 10, 1963 as quoted above.

The department then issued the determination from which the employer has appealed.

The claimant's former supervisor testified that the claimant had not reported to work in an intoxicated condition; that bartenders were permitted to take no more than two drinks while on duty; that, on his last day, the claimant had seemed bored and was drinking too much; and that the claimant was intoxicated. However, the supervisor could not estimate to what degree the claimant was intoxicated and refused to say he was "drunk." The supervisor explained his statement to the department by testifying:

"'. . . But I didn't want Bob (claimant) to suffer in any way on his unemployment, and this is what I didn't want as far as the word 'drunk' was concerned, because even a policeman arresting someone on the street in the car couldn't definitely say 'you're drunk' without giving him a test, you know. . . .'"

The supervisor further testified that the employee who sent the statement of December 10, 1963 to the agent had received her information from him (the supervisor).

REASONS FOR DECISION

Section 1327 of the Unemployment Insurance Code provides:

"'1327. A notice of the filing of a new or additional claim shall be given to the employing unit by which the claimant was last employed immediately preceding the filing of such claim, and the employing unit so notified shall submit within 10 days after the mailing of such notice any facts then known which may affect the claimant's eligibility for benefits.'"

Section 1328 of the code provides:

"'1328. The facts submitted by an employer pursuant to Section 1327 shall be considered and a determination made as to the claimant's eligibility for benefits. The claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 and authorized regulations shall be promptly notified of the determination and the reasons therefor and may appeal therefrom to a referee within 10 days from mailing or personal service of notice of the determination. The 10-day period may be extended for good cause.'"

Section 1030 of the code provides in pertinent part:

"'1030. (a) Any employer who is entitled under Section 1327 to receive notice of the filing of a new or additional claim may, within 10 days after mailing of such notice, submit to the department any facts within its possession disclosing whether the claimant left such employer's employ voluntarily and without good cause or was discharged from such employment for misconduct connected with his work.'"

* * *

"'(c) The department shall consider such facts together with any information in its possession and promptly issue to the employer its ruling as to the cause of the termination of the claimant's employment. . . .'"

Section 1030.5 of the code provides:

"'1030.5. If the director finds that any employer or any employee, officer, or agent of any employer, in submitting facts pursuant to Section 1030 or 3701, willfully makes a false statement or representation or willfully fails to report a material fact concerning the termination of a claimant's employment, the director shall make a determination thereon charging the employer's reserve account not less than 2 nor more than 10 times the wekly benefit amount of such claimant. The director shall give notice to the employer of a determination under this section. Appeals may be taken from said determinations in the same manner as appeals from determinations on benefit claims.'"

Section 1031 of the code provides:

> "'1031. No ruling made under Section 1030 may constitute a basis for the disqualification of any claimant but a determination by the department made under the provisions of Section 1328 may constitute a ruling under Section 1030.'"

Section 1032 of the code provides:

> "'1032. If it is ruled under Section 1030 or 1328 that the claimant left the employer's employ voluntarily and without good cause or was discharged by reason of misconduct connected with his work, benefits paid to the claimant subsequent to the termination of employment due to such voluntary leaving or discharge which are based upon wages earned from such employer prior to the date of such termination of employment, shall not be charged to the account of such employer unless he failed to furnish the information specified in section 1030 within the time limit prescribed in that section.'"

As the claimant's most recent employer, the appellant was entitled to a notice of claim filed under code section 1327; and such notice was mailed to it. Also, under code section 1327, the employer was required to submit within ten days after the mailing of the notice of claim filed any facts then known which might affect the claimant's eligibility for benefits. Under section 1030(a) of the code the employer was permitted, within ten days after the mailing of the claim filed, to submit to the department any facts within its possession disclosing whether the claimant left its employ voluntarily and without good cause or was discharged for misconduct connected with his work. For reasons which are not apparent, the employer failed within the time specified to submit the information required by section 1327 of the code and permitted under section 1030(a) of the code.

In Benefit Decision No. 6622, we held that the employer was not entitled to a ruling and that its account was not relieved of charges under section 1032 of the code. In so holding we stated:

> "'An employer who is the claimant's most recent employer must submit information concerning the claimant's most recent termination of employment . . . within ten days after the mailing of a notice of new claim in order to be entitled to a ruling . . . .'"

In the present case the employer, who was the claimant's most recent employer, did not submit information concerning the claimant's termination of employment within the time required and so was not entitled to a ruling. Its account was, therefore, not to be relieved of charges under section 1032 of the code.

In the agent's letter of January 10, 1964, he stated in part: "Further, the information was untimely and therefore immaterial information." We assume from this that the employer is contending that the information which it submitted was not submitted pursuant to section 1030 of the code, and that section 1030.5 is therefore not applicable.

In Ruling Decision No. 145 (now Appeals Board Decision No. P-R-3407, we considered the situation in which an employer submitted information concerning a claimant's separation from its employ in accordance with section 1327 of the code; and requested a determination of eligibility but did not request a ruling. The employer contended that the information was not submitted pursuant to code section 1030 and that, therefore, section 1030.5 was not applicable. In holding that the penalty in section 1030.5 was applicable, we stated:

> "'. . . when an employer submits information relating to a voluntary quit or discharge in response to a notice received under section 1327 of the code, such information is submitted pursuant to section 1030(a) as well as section 1327 of the code, and any determination issued by the

> department under section 1328 of the code responsive to such issue does constitute a ruling under section 1030 and section 1328 of the code . . . .'"

However, the situation in this case is distinguished from that in Ruling Decision No. 145 /now Appeals Board Decision No. P-R-340/ in that the employer herein did not submit any facts within the time specified in sections 1327 and 1030(a) of the code. The statements which were later submitted were, therefore, not submitted "pursuant to Section 1030" of the code. Accordingly, even though the statements which were submitted were patently false and willfully made, the charges provided for in section 1030.5 of the code may not be imposed.

Our position is supported by the following rule of statutory construction which we quoted in Ruling Decision No. 123 and in Benefit Decision No. 6601:

> "'The general rule of statutory construction is that if the language is unambiguous and the statute's meaning is clear, the statute must be accorded the expressed meaning without deviation since any departure would constitute an invasion of the province of the legislature (Crawford, Statutory Construction, 249). A clear and unambiguous statute must be literally construed (Miller v. Bank of America, 166 F. 2d 415). Mere inconvenience resulting from a construction according to the clear meaning of a statute will not justify the courts in ignoring its terms. Where the meaning is clear, the courts must take a statute as they find it. If its operation will result in inequality or hardship in some cases, the remedy lies with the legislature (45 Cal. Jur. 2d, Statutes § 122).'"

The term "pursuant to" is defined in Webster's Third New International Dictionary, Unabridged, as "in conformance with or agreement with." The language of code section 1030.5 is clear insofar as the issue before us is concerned. The phrase "in submitting facts pursuant to Section 1030 or 3701," punctuated as it is, is restrictive in that it limits the assessment of charges

under section 1030.5 to situations wherein the employer has performed the acts which cause it to become entitled to a ruling under sections 1030 or 3701 of the code.

It appears anomalous that an employer, who has made a willful false statement, may avoid charges to its account under section 1030.5 of the code simply by failing to comply with section 1327 of the code. However, employers may be deterred from taking advantage of this deficiency in the legislation by the provisions of Chapter 10, Part I, of the Unemployment Insurance Code, which make certain violations of the code misdemeanors If this is an insufficient deterrent, as is a matter for legislative attention and is beyond our authority to remedy.

DECISION

The determination of the department is reversed. The employer's account is not chargeable under section 1030.5 of the code.

Sacramento, California, September 4, 1964.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD F. MAHER, Chairman

LOWELL NELSON

NORMAN J. GATZERT

Pursuant to section 409 of the Unemployment Insurance Code, the above Ruling Decision No. R-148 is hereby designated as Precedent Decision No. P-R-342.

Sacramento, California, May 3, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

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